IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE

Assigned on Briefs January 27, 2009

STATE OF TENNESSEE v. GABRIEL EUGENE BUCHANON

Appeal from the Criminal Court for Hamilton County No. 260226 Don W. Poole, Judge

No. E2008-00430-CCA-R3-CD - Filed February 26, 2009

The defendant, Gabriel Eugene Buchanon, appeals his convictions of three counts of aggravated rape, *see* T.C.A. § 39-15-502(a), and one count of aggravated burglary, *see id.* § 39-14-403, and argues that the convicting evidence was insufficient as a matter of law. Discerning no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which NORMA McGEE OGLE and D. Kelly Thomas, Jr., JJ., joined.

Daniel J. Ripper, Chattanooga, Tennessee, for the appellant, Gabriel Eugene Buchanon.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; William H. Cox, III, District Attorney General; and Neal Pinkston, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

A Hamilton County Grand Jury indicted the defendant on three counts of the aggravated rape of R.D.¹ and one count of aggravated burglary. Counts One through Three alleged that on April 20, 2005, the defendant illegally penetrated the victim vaginally, anally, and orally in violation of Tennessee Code Annotated section 39-15-502(a) (2003). Count Four alleged that on April 20, 2005, the defendant "did unlawfully and knowingly enter the habitation of [the victim], without the owner's effective consent, with intent to commit theft or assault." *See* T.C.A. § 39-14-403 (2003).

Carol Waller, the victim's mother, testified that on April 20, 2005, she and R.D., who was 15 years old at the time, had lived at 411-B Donelson Road in East Ridge for "[a]bout a week."

 $^{^{1}}$ It is the policy of this court to refer to the minor victims of sexual offenses by their initials.

On April 20, 2005, Ms. Waller left her home for work at 8:00 or 8:15 a.m. She testified that, while at work, she received a telephone call from her daughter. She said, "[The victim] was very nervous, I couldn't understand what she was saying, but when she called she let me know that someone had broke in and she had been raped." Ms. Waller had a co-worker drive her home, and they arrived at her residence in "maybe 7, 10 minutes."

Ms. Waller stated that she entered through the front door of her residence and found her daughter sitting on the steps leading to the second floor of the duplex. Ms. Waller testified that R.D. was "crying" and "very nervous." Ms. Waller stated that the victim had "a knot on her head and . . . a bruise." She testified that, when she left work that morning, the victim did not have these injuries. Ms. Waller stated that her daughter "said somebody had broke in, came in through the back door and raped her." Ms. Waller then called 9-1-1.

Ms. Waller observed that the "back door was kicked in" and that the hinges had been knocked off the door. She also explained that she normally kept a flower pot on top of some speakers in her living room; however, when she arrived at the home on April 20, 2005, the speakers were missing, and the flower pot lay broken on the floor. She testified that her "whole stereo system" had been taken. On the second floor, Ms. Waller noticed that "[her] jewelry was gone, and . . . a little chain sitting on top of the dresser . . . was gone." She also noted that the bedspread in her daughter's room was missing. She testified that R.D. usually kept her room clean, but "there's [R.D.'s] towel on the bed" and something she could not identify on the floor. She also noted a mirror that leaned against the wall of her daughter's bedroom was turned in a different direction than usual. She testified that she did not give anyone permission to take her stereo or anything else from her home.

Ms. Waller testified that, after inspecting the house, she took her daughter to the T.C. Thompson Children's Hospital for medical attention. She said, "[R.D.] was kind of out of it. She wasn't really there, but the times she was there, she was crying and she was hollering and she asked me not to leave her." She explained that her daughter was "normally talkative," but she was quiet at the hospital. Ms. Waller then took her daughter to a rape crisis center where the victim was examined.

On cross-examination, Ms. Waller explained that, although she walked through her entire house before the police arrived on April 20, 2005, she "didn't touch nothing [sic]." She testified that, to her knowledge, R.D. did not eat or drink anything before her examination at the rape crisis center; however, she admitted that there were short periods of time when she was not with her daughter. She agreed that the most specific description R.D. could give of the assailants when she spoke with the 9-1-1 operator was "one of them was wearing camouflage" and "the other was wearing an orange shirt." She acknowledged that her daughter could not remember whether the men had hair. However, on redirect-examination she explained that the 9-1-1 telephone call was within 10 to 15 minutes of the rape and that R.D. later gave better descriptions.

R.D., the victim, who was 17 years old at the time of trial and 15 years old on April 20, 2005, testified that, at approximately 11:20 a.m., she was bathing her dog in the upstairs bathroom when she heard "[s]omebody . . . knocking on a door." She testified that she "went

downstairs and they stopped knocking," and "then they had went next door and knocked on our next door neighbor's door." She stated that she then returned upstairs. The victim testified that, on her way upstairs, she "heard a big boom noise like downstairs by the kitchen." She stated that she initially thought the stove had broken, and she "work[ed] her way down the steps" when she "saw somebody coming up the steps toward [her]." She later identified the man as Thaddeus Reid; however, at the time she did not know Mr. Reid or the defendant.

The victim testified that Mr. Reid "put his hands on [her] face" and she "started to cry because [she] didn't know who he was and he told [her] he wasn't going to hurt [her]." She testified that Mr. Reid laid her on her bed and "told [her] to be quiet, not to talk so loud," and then she began crying. She said, "[Mr. Reid] tried to pull off my shirt and my shorts and I said, 'I thought you weren't going to hurt me.'... He told me to shut up." She stated that he again attempted to take her shorts and shirt off and "started to get real mad." She testified that, when asked her name, she gave a false name and stated that she was 12 or 13 years old.

The victim stated that "a couple of minutes later" another man came upstairs and "did the same thing to [her], which was have sexual contact with [her]." She testified, "They both raped me, beat me with a gun, everything that you can possibly think of when somebody gets raped." She testified that both men penetrated her anally, vaginally, and orally. She stated that at one point "both of them did it at the same time."

The victim testified that Mr. Reid had a gun, and she said, "[W]hen [Mr. Reid] was raping me and I was being so loud, he got so mad at the point where he asked [the other assailant] to give him the gun to hit me." She "c[ouldn't] count" how many times she was hit, but "it was a lot of times." The men told her, "Shut up," and, "I'm not going to hurt you, be quiet, open your legs, do this, do that."

She testified that she had never had sex before this incident, and she did not know whether either man ejaculated in her. She said that the assailants "wiped [her] body down" with some household solution from the bathroom after the attack. She said, "[T]hen they put the towel on my head and then [the second assailant] said, 'Don't kill her, just make her count to a certain number." She counted and the assailants left, taking her clothing and bedspread with them. She waited approximately five minutes to call anyone because "[she] was still scared." She testified, "I was so scared that I was going to die on that day." She testified that the attack occurred in her bedroom and lasted "about 30 minutes, 45 minutes."

The victim first called her grandmother; however, "[her grandmother] couldn't understand [her] talking because [she] was so loud." The victim then called her mother, Ms. Waller. When she called, "a lady picked up and they told her what happened and she was on the way with them in five minutes." She testified that law enforcement officers arrived at the scene after her mother.

The victim stated that she went to the hospital with her mother and then went to a rape crisis center, where she was examined. The victim testified, "I had . . . the inside of my vagina messed up and I had bruises all on my face." She had "a knot or something inside [her] ear where

[she] can't hear." She had some bruises on her knee; however, her face suffered the most visible damage. She also stated her "rectum part" was "really messed up." She said her "vagina and behind w[ere] bruised in the inside, blood, blood everywhere."

She stated that during the rape, she saw Mr. Reid in the mirror, and she later identified him in a photograph lineup. She noted that Mr. Reid looked "very different" from the defendant. She described the second assailant as "kind of heavyset, he had hair." She said, "You couldn't tell his face because he had a towel on, but you could see his hair and his neck, like he had braids or something." She said that the defendant matched her description of the second assailant, but "[h]e d[idn't] have the facial hair [any]more." She testified that Detective Ralph Kenneth Freeman played a tape of the defendant's voice for her, and she stated that "it sound[ed] just like" the second assailant. She also identified the towel that was used to cover her head.

On cross-examination, the victim admitted that law enforcement officers showed her a photographic lineup, and she could not identify the defendant from the lineup. Defense counsel questioned her on inconsistencies between her testimony and statements she had previously given to law enforcement personnel. She explained, "[I]t's just . . . the day [a law enforcement officer] tape recorded me, it was so much going through my head and I told him what I could remember and what I couldn't remember." She testified that "[she had] flashbacks all the time," and "it's getting clearer."

Defense counsel also cross-examined the victim about her positive identification of the defendant's voice. She admitted that only one voice was played for her, and the recording was not presented in a "lineup" of voices. She also admitted that she heard the tape approximately a year after the rape occurred and that the officer told her, before listening to the recording, that she would listen to the voice of someone believed to be involved in the rape. The victim maintained, "When I heard the tape, I remember his voice I knew exactly how he sound[ed]." She also stated on cross-examination that Mr. Reid's blood was found on her arm; however, she did not recall seeing any cuts or blood on the second assailant.

Detective Julius Johnson testified that he received a call on April 20, 2005, to respond to a reported aggravated rape and aggravated burglary. When he arrived, the victim and Ms. Waller had already left to get medical treatment for the victim. He stated that he "process[ed] the crime scene" which involved "making photographs of the scene, doing sketches and checking for evidence; if any is found, to collect the evidence and then later forward it to the TBI crime lab."

Detective Johnson testified that he found a broken vase which he dusted for fingerprints. Although he discovered latent fingerprints, he could not identify the source of the prints. He examined the back door and found that "the doorjamb ha[d] [a] crack running up and down vertically." He also found a shoe print on the back door. Upon reviewing the upstairs of the residence, he found "what appeared to be hairs and also some stains on the mattress" in the victim's room. He also identified stains on the carpet to the left of the bed, at the head of the bed, and at the foot of the bed. He collected these portions of the carpet for analysis. Detective Johnson also collected a pair of panties found on the floor at the foot of the bed. Detective Johnson testified that

he also collected a rape kit and a pair of socks from the rape crisis center. He sent the collected evidence to the Tennessee Bureau of Investigation ("TBI") for analysis.

Detective Johnson stated that he later "received a report from the [TBI] crime lab, and in response to that, [he] later obtained a search warrant for the blood of Thaddeus Reid." He obtained the blood and forwarded the sample to the TBI crime laboratory. He received another report from the TBI that led him to swear out warrants on Mr. Reid; however, he mainly prosecuted Mr. Reid and was unaware of the defendant's involvement at this time.

On cross-examination, Detective Johnson testified that, over approximately a three month period, he showed the victim three photographic lineups with Mr. Reid. In the first lineup, he testified that the victim could not identify anyone. On the second lineup, the victim stated that she was "90 percent sure" of her first assailant; however, Detective Johnson acknowledged that the identified man was not Mr. Reid or the defendant. Detective Johnson testified that, during the third lineup presentation, the victim clearly identified Mr. Reid as the first assailant. He testified that he never showed her a photographic lineup including the defendant. Detective Johnson also testified that he eventually discarded the hairs found on the victim's mattress because they appeared to be dog hair, not human hair. Detective Johnson stated that he did not keep a "crime scene log" in this situation. He testified that his only involvement with the investigation of the defendant was his participation in an interview of the defendant with the Chattanooga police.

Detective Ralph Kenneth Freeman of the Chattanooga Police Department testified that he first suspected that the defendant was involved in the rape when he discovered that Mr. Reid was the defendant's uncle and that both used a shared address on Summertime Court. Although Detective Freeman could not testify that the defendant and Mr. Reid lived at that address, he knew that the defendant's mother, who was also Mr. Reid's sister, lived at the residence. He testified that the defendant's brother lived in the East Ridge area, where the rape occurred.

Detective Freeman testified that he met with the victim at the district attorney's office in April of 2006. He showed the victim a photographic lineup including the defendant; however, the victim was unable to identify the defendant. Detective Freeman testified that the victim "said [the second assailant] had a distinctive voice," so he "played a tape of [the defendant's] voice and she identified him as the person." At that point Detective Freeman obtained a search warrant for the defendant's blood, which he sent to the TBI crime laboratory.

On cross-examination, Detective Freeman admitted that he only played the defendant's voice to the victim, and he did not present the voice in a lineup. He denied telling the victim, before playing the audio recording, that the voice belonged to a "suspect." He explained, "[W]hen she was asked about this distinctive voice, then that's when I wanted her to listen to the tape, to see if she could identify this distinctive voice, that was going to be it."

Nurse Ardyce Rudolfo, a family nurse practitioner and certified sexual assault nurse examiner, testified that she was on-call for the Sexual Assault Crisis and Resource Center on April 20, 2005. She examined the victim approximately six hours after the rape occurred. She testified that, when she brought the victim into the examination room, she "seemed calm, but . . . was crying

at the time." She testified that the victim had "obvious . . . bruises to her face." The victim reported that she had been raped orally, vaginally, and anally by two men. Nurse Rudolfo testified that the victim told her that "the first person was the one she met on the stairs with camouflage pants and she also was able to see his face some. The second person she identified by his voice and by the fact she could see gray pants a couple of times." The victim told her that she could distinguish the two men by their voices but that her face was covered, and she was told not to look at them. Nurse Rudolfo stated that the victim told her that, since the rape, she had urinated, had a drink, and changed clothes.

Nurse Rudolfo explained that the medical reports reflected "a bruise approximately one inch by one and a half inches under the left eye, . . . [and] a bruise under the right side of the chin that was about half inch to three-quarters of an inch." She testified that "on the left side of the face there was a three and a half by three inch purple abrasion" and "[t]here was also a three and a half by two inch bruise under the right side of the chin." The victim had "a two inch by one inch purple bruise" on her left leg. Nurse Rudolfo reported "two crescent-shaped lacerations" on the right side of the victim's neck. She testified that, from what she learned from the victim, all these injuries were a result of the attack.

Upon examining the victim's vagina, Nurse Rudolfo reported abrasions "all around" the victim's labia minora. She testified that the opening into the victim's vaginal area was "very bright red," and she found "eight tears along the posterior fourchette." She said, "We also found tears and abrasions around the sphincter of the anus," and, "[T]here was blood in the rectal folds . . . which is unusual to find." She testified that she performed a "rape kit," which includes "swabs, a comb to collect pubic hair, a slide to collect fluid from the vaginal area or the rectal area, and . . . also . . . blood of the [victim]." The rape kit also included toilet paper, a swab of the victim's breast, and a swab of dried blood found on the victim's arm.

Nurse Rudolfo, certified as an expert in "sexual assault examinations," testified that, in her expert opinion, the victim was raped anally, vaginally, and orally. She testified that the absence of semen did not change her opinion.

Agent Charles Hardy of the TBI serology deoxyribonucleic acid ("DNA") analysis section examined the forensic evidence in the victim's case. He performed his first examination of the evidence before the Chattanooga Police Department investigated the defendant as a suspect. He testified that the swabbing of the victim's mouth, anus, and vagina produced no indication of the presence of semen. Agent Hardy testified that he found no presence of semen from the toilet paper sample or the victim's panties. The swab taken from the victim's breast produced no DNA. Agent Hardy found that the victim's socks tested positive for human blood, and he found that Mr. Reid was the major DNA contributor and that the victim was a minor contributor. He testified that the swab of blood found on the victim's arm also produced a DNA profile that matched Mr. Reid.

Agent Hardy also conducted tests on the towel used to wrap the victim's head. A stain on the towel tested positive as blood, so he conducted a DNA analysis. He testified that he found three DNA profiles. The major contributor was an unknown male, and minor DNA contributions belonged to Mr. Reid and the victim. Agent Hardy stated that, when he first tested the towel, he only had the DNA profiles of the victim and Mr. Reid to compare; however, the next year

he received a blood sample from the defendant. He said, "I found that the DNA that I recovered from the towel matched the DNA profile that I generated for [the defendant], based on the blood sample that was submitted." He explained, "My opinion is that if the blood was the only sample on there, him being the major contributor of the DNA, that would have necessarily been his bloodstain." He testified he had "no doubt" that the DNA belonged to the defendant, and "the probability of an unrelated individual having the same DNA profile from either the African-American, Caucasian, Southeastern Hispanic or Southwest Hispanic populations, exceeds the current world population." Agent Hardy stated that he found no other DNA profiles other than those matching the defendant, the victim, and Mr. Reid. On cross-examination, Agent Hardy agreed that he used "a very limited sample" in his testing and that the towel was the only item containing the defendant's DNA.

The defendant chose not to testify and presented no defense proof. Based on the evidence as summarized above, the jury returned verdicts of guilty on all counts. After a sentencing hearing, the trial court ordered that the defendant serve three concurrent sentences of 20 years' incarceration as a violent offender with release eligibility of 100 percent for his three aggravated rape convictions. The trial court ordered the defendant to serve three years' incarceration, consecutively to his rape convictions, as a standard offender with standard release eligibility of 30 percent for his aggravated burglary conviction. The trial court also imposed community supervision for life upon the defendant's release from custody.

The defendant states his sole issue as "[w]hether there was sufficient evidence to convict the defendant of four counts of aggravated rape." We note, however, that the defendant was not convicted of four counts of aggravated rape, and we observe that the defendant's brief substantively argues his three aggravated rape convictions and his aggravated burglary conviction.

The defendant frames the "primary issue" as "whether [the defendant] was the individual who joined with Thaddeus Reid to rape [the victim] and to burglarize the home of [the victim] and her mother." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict because a guilty verdict destroys the presumption of innocence and replaces it with a presumption of guilt. *See State v. Evans*, 108 S.W.3d 231, 237 (Tenn. 2003); *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). This court must reject a defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. *See Carruthers*, 35 S.W.3d at 558; *Hall*, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. *See State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Issues of the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier

of fact, and this court will not re-weigh or re-evaluate the evidence. *See Evans*, 108 S.W.3d at 236; *Bland*, 958 S.W.2d at 659. This court may not substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. *See Evans*, 108 S.W.3d at 236-37; *Carruthers*, 35 S.W.3d at 557.

Tennessee Code Annotated section 39-13-502 defines aggravated rape as,

unlawful sexual penetration of a victim by the defendant . . . accompanied by the following circumstances:

- (1) Force or coercion is used to accomplish the act and the defendant is armed with a weapon . . . ;
 - (2) The defendant causes bodily injury to the victim;
- (3) The defendant is aided or abetted by one (1) or more other persons; and
 - (A) Force or coercion is used to accomplish the act

T.C.A. § 39-13-502(a). The defendant, in his brief, does not challenge the elements of the offense, but he challenges the sufficiency of the evidence establishing his identity as the second assailant. We find that the record provides ample evidence to support the jury's determination that the defendant was the second assailant who raped the victim.

The victim testified that the physical build of her second assailant was similar to that of the defendant. She positively identified a recording of the defendant's voice as the "distinct" voice of the second man who raped her. The victim told the jury and Nurse Rudolfo that both men raped her, and the forensic evidence established that the defendant was at the victim's residence with Mr. Reid. Further, Detective Freeman testified that Mr. Reid was the defendant's uncle and shared an address with him, and the defendant's brief does not dispute that Thaddeus Reid participated in the rape of the victim. Lastly, Agent Hardy testified that the defendant's blood was found on the towel used to cover the victim's head during the rape. Agent Hardy stated that he had "no doubt" that the DNA found on the towel belonged to the defendant. As noted from the testimony of Ms. Waller, the victim, and Detective Johnson, the towel containing the defendant's DNA was left in the victim's bedroom where the rape occurred.

The defendant mainly argues the evidence was insufficient due to inconsistencies in the victim's testimony; however, it is not this court's responsibility to re-weigh and re-evaluate the testimony, and the jury's verdict resolved these issues in the favor of the State. *See Evans*, 108 S.W.3d at 236; *Bland*, 958 S.W.2d at 659. The evidence established a relationship between Mr. Reid and the defendant, an identification of the defendant's voice as the second assailant, and the presence of the defendant's DNA at the crime scene. The jury acted within its discretion in convicting the defendant of aggravated rape based on the evidence.

A person commits aggravated burglary, under Code section 39-14-403, when he enters a habitation with the intent to commit a felony, theft, or assault. T.C.A. §§ 39-14-402; -403.

A "habitation" is "any structure, including buildings, module units, . . . which is designed or adapted for the overnight accommodation of persons." *Id.* § 39-14-401(1)(A). Again, the defendant does not challenge the elements of the offense but only his identity.

The evidence established that Ms. Waller and the victim lived at the 411-B Donelson Road residence. Ms. Waller testified that she did not give the defendant or anyone else permission to enter her home and take her personal possessions. She testified that, when she left for work, her stereo system and jewelry were in her home, and, upon examining the home after her daughter was raped, those items were missing. The victim testified that she heard a loud sound in the kitchen shortly before Mr. Reid approached her on the stairs. Detective Johnson observed a footprint on the broken back door of the residence. The evidence reflected that the victim, the defendant, and Mr. Reid were the only people at the residence between the time Ms. Waller left for work and the time she returned to the home. Further, as discussed above, the evidence sufficiently showed that the defendant entered the home without consent and raped the victim. All of the above provide ample evidence to support the jury's verdict.

For the above-stated reasons, we find that sufficient evidence supported the jury's convicting the defendant of aggravated rape and aggravated burglary, and we affirm the judgments of the trial court.

JAMES CURWOOD WITT, JR., JUDGE